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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TYREESE REED, Defendant and Appellant.	B216570 (Los Angeles County Super. Ct. No. BA287823)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Affirmed in part and remanded.

Mark De Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General; Dane R. Gillette, Chief Assistant Attorney General; Pamela C. Hamanaka, Senior Assistant Attorney General; Michael C. Keller and David A. Wildman, Deputy Attorneys General.

INTRODUCTION

On February 9, 2009, a jury convicted Appellant Tyreese Reed of numerous felonies, including three counts of forcible rape, one count of forcible sodomy, four counts of forcible oral copulation, one count of kidnapping and two counts of first degree burglary. At trial, the prosecution introduced extensive DNA evidence implicating Reed in the crimes. Reed appeals his conviction, arguing that his Sixth Amendment right to confrontation was violated when witnesses testified about the results of DNA analysis and medical examinations that were conducted by non-testifying third parties. Additionally, Reed alleges ineffective assistance of counsel and various evidentiary and sentencing errors. We affirm Reed's conviction but remand to modify a portion of his sentence.

FACTUAL AND PROCEDURAL BACKGROUND

A. Offenses and Criminal Investigation

1. Celia B.

On October 13, 2004, at approximately 6:30 p.m., Celia B. was inside her apartment building when she noticed a man standing outside the front security gate. Believing he was a tenant, Celia let the man into the building. While Celia looked through her mail, the man appeared to be talking on his cell phone. Celia went to the elevator and the man followed her. After Celia unlocked her front door, the man pointed a gun at her and entered the apartment. He asked Celia if she had any money and ordered her to take off her clothes. Celia refused and the man struck her in the head with the gun and punched her all over her body. He then began ripping her clothes off. After tying her hands, the man pulled Celia's pants down and raped her. The man then ejaculated on her face and head. Shortly thereafter, the man's cell phone rang and he answered the call. He then ordered Celia into the bathtub and told her to stay there or he would kill her.

After the man left, Celia called 911. The police transported Celia to a hospital, where a nurse examined her and took swabs from her mouth and vagina. The nurse then

placed the swabs into an evidence kit, and gave it to Officer Deana Stark, who booked the item into evidence.

On May 20, 2005, the police showed Celia a series of photographs and she identified as her assailant an individual who was not Tyreese Reed. At trial, however, Celia identified Reed as her attacker, stating "It's him . . . I recognize him."

2. Ester C.

On December 9, 2004, at approximately 10:00 p.m., Ester C. was walking to her car in a parking lot located near the University of Southern California (USC). After entering her automobile, Ester attempted to close the door, but it was blocked by a man standing near the car. The man pointed a gun at Ester and ordered her to give him her cell phone and move to the other side of the car. He then asked Ester for her wallet and other items, including an I-pod and computer. After Ester gave him all her cash, the man opened his pants, pulled out his penis and demanded that she orally copulate him. Ester refused and the man began masturbating. Ester was unsure whether he ejaculated.

After the man left the scene, Ester called her husband and was picked up by a USC campus police officer. While describing the attack to the officer, Ester discovered something wet in her hair. An officer of the Los Angeles Police Department transported Ester to a hospital where she was examined by a nurse. The nurse took a clipping of Ester's hair and placed it into an evidence kit. After the examination was complete, the nurse gave the evidence kit to Officer Alessandro Moura, who then booked the item into evidence.

3. Ara C.

At 10:45 p.m., on April 5, 2005, 17-year- old Ara C. arrived at her apartment building and opened the gate to her parking garage. Ara parked her car and walked to the elevator room. A man approached the elevator room and Ara held the door open for him. While they were waiting for the elevator, the man attacked Ara, placing one arm around her neck while holding a gun to her side. The attacker said he would kill Ara if she screamed and asked if she had any money. Ara informed the assailant she had money in her car. The man accompanied Ara back to her car and she gave him $100 in cash. The

man ordered Ara to lie face down behind her car and searched her automobile for other valuables. He then removed Ara's pants and tried to penetrate her vagina with his penis. He then forced Ara to orally copulate him at gunpoint. The man ejaculated in Ara's mouth and then raped her. After a noise came from the elevator room, the man told Ara to hide and be quiet. The man then put his pants on and again searched Ara's car for additional belongings.

After the attacker fled, Ara informed her mother what had occurred and her mother called the police. The police transported Ara to a hospital, where she was examined by a nurse who took specimens from Ara's body and vaginal area. The nurse then placed the items in an evidence kit and handed it to Officer Cynthia Santa Maria, who booked the items into evidence.

During trial, Ara stated that she would not be able to identify her assailant and was unsure whether he was in the courtroom.

4. Patty K.

At approximately 9:20 a.m. on May 4, 2005, Patty K. arrived at a parking garage located below her office building. While retrieving her laptop computer from her backseat, Patty felt something hard press into her back and turned around. A man pointing a gun at Patty ordered her to give him all her money. After Patty informed him she did not have any money, the man said "Then I have to fuck you." Patty informed the man she was four months pregnant and begged him not to harm the child. The man then ordered Patty into the car and, while pointing the gun at her head, forced her to orally copulate him. The man ejaculated in her mouth and told her to spit it outside the car, which she did. He told Patty that he was taking her laptop and told her to stay in the car for five to ten minutes.

After the man left, Patty went to her office and contacted the police. The police transported Patty to a hospital, where she was examined by a nurse who took swabs from her breast and mouth. The nurse handed the specimens to Officer Brian Chung, who booked them into evidence.

On July 29, 2005, police showed Patty an array of photographs and she identified Reed as her assailant.

5. Kyung C.

On May 21, 2005, at about 3:20 a.m., Kyung C. was working at a 24-hour establishment that provided acupressure treatment. While working on a client, Kyung heard her co-worker screaming. Kyung went into the hallway and saw a man holding what appeared to be a gun, motioning her into the employee break room. The man forced Kyung into the room and tore her clothing. Kyung's female co-worker was crouched in a fetal position in the corner of the room. The man showed the women a badge, stated that he was a police officer and requested that they provide a copy of their license. He then pulled out his penis and demanded that the women take off their clothes and orally copulate him. Kyung told the assailant that the customer in the next room was a police officer, which caused the man to flee. Kyung immediately contacted the police and told them what had occurred.

On July 29, 2005, the police showed Kyung an array of photographs and she identified Reed as her assailant. However, she was unable to identify him at trial.

6. Mitsuko T.

On May 27, 2005, at approximately 3:00 a.m., Mitsuko T. parked her car in a garage located beneath her apartment building. As she walked toward her front gate, she saw someone walking on the street, speaking on his cell phone. Mitsuko walked into the building and, while checking her mail, observed that the man was standing by the gate, still talking on his phone. After Mitsuko unlocked her front door, the man showed her a gun and ordered her to go inside her apartment. He then took Mitsuko to her bedroom and told her to take off her clothes. Mitsuko told the man that she had a venereal disease. The man put on a condom and then raped and sodomized Mitsuko. He then removed his condom and started masturbating close to Mitsuko's face. He put his penis into her mouth and ejaculated. The man then asked Mitsuko for money and she gave him approximately $75. He also took Mitsuko's cell phone and credit cards and then tied her up and left.

Mitsuko showered and went to the police department with her boyfriend. She was later taken to a hospital and examined by a nurse. On July 29, 2005, the police showed Mitsuko an array of photographs and she identified Reed as her assailant. She also identified him at trial.

7. Investigation and arrest

In 2004, Los Angeles Police Detective Jesse Alvarado was assigned to lead a task force investigating a series of sexual attacks. On July 29, 2005, at about 1:30 a.m., an officer assigned to the task force, Alex Ronquillo, observed Reed driving an automobile. Ronquillo, who was working undercover in an unmarked car, believed that Reed matched a sketch of the suspect and began to follow him. Reed eventually pulled parallel to Ronquillo's vehicle and inquired whether the Officer and his partner were following him. After Ronquillo said no, Reed showed them a badge and stated that he was a state parole officer doing some work. Reed then drove off and pulled into a parking spot down the street. Ronquillo observed Reed sitting outside an apartment building, appearing to talk on his cell phone. Ronquillo called for officer assistance and requested that uniformed police detain and interview the suspect.

When the responding officers approached Reed, he walked into an apartment building. After five to ten minutes, Reed exited the building and was taken into custody. Officers located a gun and what appeared to be a police badge abandoned on the roof of the building that Reed had exited. Ronquillo and his partner also found a black bandana and an empty holster in the front seat of Reed's car.

Detective Alvarado later met with Reed, who agreed to provide a saliva sample. Detective Contreras swabbed the inside of Reed's cheek and booked the swab into evidence. Criminologists later extracted a genetic profile from Reed's saliva, which matched a genetic profile extracted from the biological specimens of Celia B., Ester C., Ara C. and Patty K.

On August 1, 2005, Alvarado and other detectives searched Reed's vehicle pursuant to a search warrant. They found a computer and a bag in the trunk of the vehicle. Patty K. testified that the bag and computer belonged to her and had been stolen

during her assault. A forensic expert testified that the operating system in the computer was registered to Patty and that the computer contained a photo of Reed along with data in the name "Tyreese."

On October 2, 2006, the Los Angeles County District Attorney filed an 18 count amended information charging Reed with two counts of first degree burglary (Pen. Code, § 459[1]), three counts of forcible rape (§ 261, subd. (a)(1)), four counts of attempted forcible oral copulation (§§ 664/288a), five counts of second degree robbery (§ 211), one count of kidnapping (§ 207, subd. (a)), two counts of forcible oral copulation (§ 288a, subd. (c)(2)), and one count of forcible sodomy. (§ 286, subd. (c)(2).)

B. DNA and Medical Evidence

1. Pre-trial discussions regarding medical and DNA testimony evidence

During a pre-trial conference, the prosecutor informed the court that it intended to "introduce the DNA evidence and medical evidence through business records by a supervisor, custodian of records," explaining that "the actual technician who did the DNA testing will not be coming in." The prosecutor also stated that he intended to call witnesses who would testify to the content of medical examination reports prepared by non-testifying third parties. Specifically, the prosecutor explained that "[t]he nurse [witness] will not testify to anything that was told . . . by the patient. [¶] . . . [¶] It will be the nurse's observations and the swabs and the medical evidence. [¶] . . . [¶] Their supervisor will be called in and testify through business records. And also, for the court's knowledge, the actual business records will not be given to the jury." In response, defense counsel said he understood the prosecutor intended to call witnesses whose testimony would be based on business records prepared by non-testifying third parties and stated that "I don't think there's an objection." Defense counsel also stated that he understood that the witnesses would testify as to the content of the business records but the records themselves would not be admitted.

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[1] All statutory references are to the Penal Code unless otherwise indicated.

After listening to the parties, the trial court stated that the California Supreme Court had recently decided a similar Sixth Amendment evidentiary issue in *People v. Geier* and asked defense counsel whether the case would be "a problem," leading to the following exchange:

> DEFENSE COUNSEL: The supervisor he's bringing in . . . is going to have personal knowledge or something. My understanding was he would have some personal knowledge of it. And with that condition, no.
>
> COURT: All right. I'm concerned here you guys are not on the same page. Is this person going to have some personal knowledge, or are they just simply going to be working from records that someone else created in doing the DNA testing?
>
> PROSECUTION: This supervisor trained and supervised the person who actually conducted the test and knows her well. They worked side by side for quite some time,
>
> COURT: Let me help you out. You are saying different things . . . So it sounds to me like it's an issue. Is it an issue, or is it not? This person that you're calling in is relying on records. They did not actually participate in the testing of the DNA. They weren't there when it was done. Is that correct?
>
> PROSECUTOR: That is correct.
>
> COURT: So that's the facts, Mr. Saltalamacchia. What do you have to say to that?
>
> DEFENSE COUNSEL: Your honor, I think he can testify from his personal knowledge of the relevant records, and to that there won't be an objection.

The court then informed the parties that the issue in *Geier* was "on cert to the U.S. Supreme Court." The court continued: "I don't think that this precludes me from using the reasoning of that case . . . and I would allow the evidence to come in probably for the reason cited in that case. [¶] But I just wanted to make both parties aware I knew there was this case and there is this issue. And, in fact, the U.S. Supreme Court is going to resolve it. And there are other states that don't even require – I think they require affidavits or something, but it's a whole issue in front of the Supreme Court."

The court again asked defense counsel if he was satisfied with the manner in which the prosecution intended to introduce the DNA and medical evidence, and counsel stated "It does seem to be the cleanest way to do it, yes, your honor."

3. Trial testimony regarding medical and DNA evidence

At trial, the prosecution introduced extensive testimonial evidence about DNA testing that had been conducted on the biological specimens extracted from Reed and several of the victims.

a. Reed's genetic profile

Detective Alvarado, who headed a rape task force investigating Reed's crimes, testified that on July 29, 2005, he obtained consent from Reed to obtain a sample of his saliva. Thereafter, Alvarado observed his colleague, Detective Contreras, swab the inside of Reed's cheek. Although Alvarado did not see Contreras place the swab into an evidence bag, he stated that it would be standard protocol for Contreras to do so. Alvarado also stated that, shortly after Contreras swabbed Reed's cheek, he saw an envelope with a swab in it, which was then booked into the LAPD property division.

Guy Hollomon, an LAPD DNA analyst, testified that he had reviewed a DNA report analyzing Reed's saliva. The report had been prepared by Holloman's co-worker, Stephanie Wilson, who had trained Hollomon and "was qualified to do DNA casework." According to Hollomon's testimony, Wilson's report stated that she had extracted a "genetic reference" from Reed's saliva sample.

Jennifer Butterworth, who had served as an LAPD DNA analyst since 1999, also testified about Wilson's analysis of Reed's saliva sample. Butterworth and Wilson had trained and worked together. Butterworth testified that Wilson's report indicated that she had conducted a DNA analysis on Reed's saliva sample and extracted a genetic profile. On cross examination, defense counsel asked Butterworth "Where is Mrs. Wilson today?" Butterworth responded that she was "home with her baby," and conceded that she "probably" would have been available to testify at trial.

b. Trial testimony regarding DNA evidence from Celia B.

Julie Lister, a nurse practitioner working in the violence intervention program at USC, testified that she had conducted more than 4,000 Sexual Assault Response Team (SART) examinations. She also stated that, when conducting a SART examination, nurses were required to follow a specific protocol established by the Office of Criminal Justice Planning.

Lister testified that she had reviewed a SART examination report prepared by Toni Zaragoza, whom Lister had trained and supervised. According to Lister, the report stated that Zaragoza had examined Celia B. on October 13, 2004, and collected biological specimens from Celia's oral area, vaginal area, neck, breast and abdomen. Although the report did not describe how the specimens were packaged, Lister stated that, according to standard protocol, the samples would have been labeled with the patient's name and other identifying information, and then placed in a sealed evidence kit. Zaragoza's report stated that, after examining Celia, she had handed an evidence kit containing Celia's specimens to Officer Deana Stark.[2] On cross examination, defense counsel asked Lister "Where is Zaragoza today?" Lister explained that she no longer worked in the hospital and she was not sure where she might be.

Rick Staub, a laboratory director at a DNA lab called Orchid Cellmark Laboratories, testified that his colleague, Paula Clifton, had conducted DNA analysis on the specimens taken from Celia. Staub stated that, according to Clifton's report, she had extracted a genetic male profile from Celia's specimen and then returned the sample to the LAPD. On cross-examination, defense counsel asked Staub "Where is Paula Clifton?" Staub stated that Clifton no longer worked at the company and he was unsure of her whereabouts. Defense counsel also asked Staub to confirm that his testimony was based on "reading other people's reports" and that he had not "personally" conducted any of the work to which he was testifying. Staub admitted that was true.

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[2] Officer Stark provided testimony corroborating that she had received the kit from Zaragoza and booked it into evidence.

Guy Hollomon testified that he had reviewed a DNA analysis report that compared the genetic profile Staub extracted from Celia's specimen to the genetic profile that Stephanie Wilson had extracted from Reed. According to Holloman's testimony, the report indicated that the two genetic profiles matched and that the chances of the same genetic profile occurring in the general public were 1 in 100 quadrillion.

c. Trial testimony regarding DNA evidence from Ester C.

Officer Allessandro Moura testified that, on December 9, 2004, he transported Ester C. to a hospital, where she was examined by a nurse practitioner named Joyce Foyasaro. At the conclusion of the examination, which Moura did not observe, Foyasaro handed Moura an evidence kit, which Moura later logged into evidence. Ester, in turn, testified that, after her assault, she was taken to a hospital and examined by a nurse who took a clipping of her hair and placed it into a bag.

Jennifer Butterworth testified that on May 7, 2005, she received an evidence kit from the evidence control section of the police department containing a sample of Ester's hair. Butterworth extracted a DNA genetic profile from sperm that she had located on the hair. Butterworth further testified that, according to a report written by Stephanie Wilson, Wilson had conducted a DNA comparison between the genetic profile Butterworth extracted from Ester's hair and Reed's genetic profile. Wilson's report stated that the two profiles matched and that the chances of the same genetic profile occurring in the general public were 1 in 100 quadrillion.

d. Trial testimony regarding DNA evidence from Ara C.

Sally Wilson testified that she was a registered nurse who had conducted between 500 and 600 SART examinations and conducted numerous trainings on SART procedures. Wilson stated that she had reviewed a SART examination report prepared by Irene Rodriguez, whom Wilson had supervised for about two years. According to Wilson's testimony, Rodriguez's report stated that she had examined Ara C. on April 6, 2005 and taken biological specimens from her. The report also stated that after the examination, Rodriguez handed Officer Dreschler an evidence kit containing Ara's

specimens.[3] On cross examination, defense counsel asked Wilson "You know where Irene Rodriguez is today?" Wilson stated that she did not.

Russell Baldwin, who supervised the DNA section of the of the crime lab at the Orange County Sheriff's Department, testified that, on April 9, 2005, he received an evidence kit from the evidence control unit containing Ara C's biological specimens. After extracting a DNA profile from the specimens, Baldwin received a fax from Stephanie Wilson that purported to contain information about Reed's genetic profile. Baldwin then compared Reed's profile to the genetic profile he extracted from Ara and found that they matched. He determined that the frequency of the DNA profile in the general population was less than one in one trillion.

On cross examination, Baldwin conceded that the accuracy of the genetic "match" was dependent on the information that Wilson had provided about Reed's genetic profile. Specifically, defense counsel inquired whether "you're making the comparison off [Wilson's] fax and whatever errors or nonerrors she may have committed?" Baldwin replied yes.

e. Trial testimony regarding Patty K.'s DNA Evidence

Julie Lister testified that, on May 4, 2005, she conducted a SART examination of Patty K. Lister collected biological specimens from Patty's mouth, lips and breast and placed the materials into an evidence kit. Lister then gave the evidence to "Officer Koren."[4]

Jennifer Butterworth testified that she had reviewed a DNA report prepared by Stephanie Wilson that analyzed the specimens taken from Patty K. According to

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[3] Officer Cynthia Santa Maria's provided testimony corroborating that on April 6, 2006, she and Officer Dreschler had transported Ara C. to a hospital, that Rodriguez examined the victim and that, at the conclusion of the exam, Dreschler received an evidence kit from Rodriguez and booked it into evidence.

[4] Officer Brian Chung provided testimony corroborating that, on May 4, 2005, he and Officer Brian Koren had transported Patty to a hospital, that Lister examined the victim and that, at the conclusion of the exam, Chung received an evidence kit from Lister and booked it into evidence.

Butterworth's testimony, the report stated that Wilson had extracted a genetic profile from sperm she found in Patty's specimens and compared it to Reed's genetic profile. Wilson's report stated that that the profiles matched and that the chances of the same genetic profile occurring in the general public were 1 in 100 quadrillion.

C. Verdict and Sentencing

The jury found Reed guilty of 16 felony counts. Reed was acquitted of one count of second degree robbery, which was charged in relation to his attack on Kyung C. and the People dismissed a single claim of attempted forcible oral copulation. The trial court imposed a total consecutive sentence of 56 years, 10 months, plus 100 years to life imprisonment along with numerous forms of restitution and fees.

DISCUSSION

Reed raises six arguments on appeal: (1) the prosecution failed to establish "chain of custody" over the biological specimens that were subjected to DNA analysis, (2) Reed's Sixth Amendment right to confrontation was violated when the prosecution called witnesses who testified to the content of DNA and medical reports prepared by non-testifying third parties; (3) Reed's attorney, Samuel Saltalamacchia, provided ineffective assistance of counsel by failing to object to the admission of DNA and medical evidence; (4) the trial court improperly denied Reed's *Marsden* motion; (5) the trial court engaged in judicial misconduct when it asked a witness whether she could identify her attacker, and (6) the trial court improperly calculated a portion of his determinate sentence.

A. Reed Has Forfeited His "Chain of Custody" Claim

Reed argues that the trial court erred in admitting any DNA evidence because the prosecution failed to establish "chain of custody" over his saliva specimen and the biological specimens taken from Celia B., Ester C., Ara C. and Patty K. Reed contends that, in order to complete the chain of custody, the prosecution was required to introduce testimony from the nurses who conducted each SART examination and the criminalists who conducted the DNA analysis. Reed asserts that, without such testimony, "there is no competent evidence that[:]"

> (1) the nurses properly took the DNA evidentiary swabs and cuttings; (2) even if they properly took the DNA evidentiary swabs and cuttings, that the nurses properly packaged and labeled them; (3) that what the nurses handed to the testifying police officers were the DNA evidentiary swabs and cuttings that the police believed they were; (4) that the samples obtained by the criminalists were the same samples as had been previously booked into evidence and (5) that the missing criminalists properly conducted DNA analysis on the samples and did so without cross contamination.

Reed concedes that his attorney never objected to the admissibility of the DNA evidence on chain of custody grounds. "[N]umerous decisions by [the California Supreme Court] have established the general rule that trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal results in a forfeiture of the issue on appeal." (*People v. Dykes* (2009) 46 Cal.4th 731, 756.) This rule applies to chain of custody claims. (*People v. Baldine* (2001) 94 Cal.App.4th 773, 779 ["Objections related to the chain of custody are waived if not timely asserted"].)

Despite this well-established rule of procedure, Reed argues that we have discretionary authority to review his claim. In support, he cites *People v. Williams* (1998) 17 Cal.4th 148, which states that "[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party." (*Id.* at p. 161, fn. 6.) However, *Williams* further explains that an appellate court lacks discretion to consider a claim that was not preserved at trial "when the issue involves the admission (Evid. Code, § 353) or exclusion (*id.*, § 354) of evidence." (*Ibid.*) *Williams* makes clear that where, as here, the defendant did not object to the admission of evidence at trial, we have no discretion to review the merits of the issue on appeal.

We further note that, contrary to Reed's assertions, defense counsel did not simply forfeit this claim by "inadvertently . . . fail[ing] to object on the specific grounds pursued in this court." During a pretrial evidentiary hearing, the prosecutor stated that he planned to introduce the "the DNA evidence and medical evidence through business records by a supervisor" and that "the actual technician who did the DNA testing will not be coming in." The prosecutor also explained that he intended to introduce evidence about the

victims' SART examinations through the testimony of supervising nurses who had reviewed SART reports prepared by individuals who would not be testifying. The trial court then informed defense counsel that a similar evidentiary issue was pending before the Supreme Court and asked whether he had any problems with the prosecutor's proposal. In response, counsel stated that he would not object and that "it does seem to be the cleanest way to do it." This colloquy demonstrates that, rather than "inadvertently" failing to object, counsel was told exactly how the prosecution intended to present the DNA and medical evidence and made an affirmative decision not to object.

B. Reed Forfeited His Sixth Amendment Claim

Reed next argues that the prosecution violated his Sixth Amendment right to confrontation when it called witnesses to testify to the content of various medical examinations and DNA reports that were prepared by non-testifying third parties. Reed's argument is based on *Melendez-Diaz v. Massachusetts*, (2009) 129 S.Ct. 2527 (*Melendez-Diaz*), which held that an affidavit stating the nature and weight of a controlled substance recovered from the defendant was "testimonial" hearsay and therefore subject to the requirements of the Sixth Amendment's confrontation clause. For the reasons discussed below, we conclude that, although *Melendez-Diaz* was decided after Reed was convicted, he has forfeited this claim by failing to object at trial.

1. Legal Framework: Crawford, Davis, Geier and Melendez-Diaz

In *Crawford v. Washington*, (2004) 541 U.S. 36, the United States Supreme Court held the Sixth Amendment's right to confront witnesses precludes the admission of "testimonial" hearsay against a defendant in a criminal trial unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination even if the hearsay statement falls within a recognized exception to the hearsay rule. (*Id.* at pp. 53-54.) In *Davis v. Washington*, (2006) 547 U.S. 813, the Court offered guidance for determining when statements are testimonial, explaining that: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the

circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id*. at p. 822.)

In *People v. Geier*, (2007) 41 Cal.4th 555 (*Geier*), the California Supreme Court reviewed *Crawford* and *Davis* to determine whether the admission of expert testimony based on DNA test results obtained by a non-testifying third party violated the defendant's Sixth Amendment right to confrontation. After conducting an extensive review of cases that had considered the issue, the Court concluded that a statement is testimonial, and therefore subject to the confrontation clause, "if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Id*. at p. 605.) The Court ruled that DNA reports do not satisfy the second factor because they "constitute a contemporaneous recordation of observable events rather than the documentation of past events." (*Ibid*.) In addition, the Court found that although DNA analysts "could reasonably . . . anticipate[] that [their] report[s] might be used at a later criminal trial," the reports were "not themselves accusatory, as DNA analysis can lead to either incriminatory or exculpatory results." (*Ibid*.) Accordingly, the Court held the DNA testing report was not testimonial and its admission did not conflict with *Crawford*.

After *Geier* was decided, the United States Supreme Court held in *Melendez-Diaz*, *supra*, 129 S.Ct. 2527, that the Sixth Amendment precluded the prosecution from introducing "affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendants was cocaine." (*Id*. at p. 2530.) The Supreme Court ruled that the affidavits were testimonial statements because they were "functionally identical to live, in-court testimony" and were "'"made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial."' [Citation.]" (*Id*. at p. 2532.) The Court found that the analysts who issued the affidavits were "accusatory" witnesses because "they provided testimony *against* petitioner, proving one fact necessary for his

conviction." (*Id*. at p. 2533.) The majority also rejected the dissent's contention that the affidavit was non- testimonial because it "contains near-contemporaneous observations of the [forensic] test." (*Id.* at p. 2535) In the majority's view, the dissent argument "misunders[tood] the role that 'near-contemporaneity' has played in [the] case law."

The California Courts of Appeal have disagreed whether *Geier* remains good law after *Melendez-Diaz*, a question currently pending before the California Supreme Court.[5] At a minimum, *Melendez-Diaz* appears to reject *Geier's* conclusion that "the crucial point" in determining the applicability of the confrontation clause "is whether the statement represents the contemporaneous recordation of observable events." (*Geier, supra*, 41 Cal.4th at p. 607.)

There are, however, obvious and significant factual distinctions between the two cases. In *Melendez-Diaz*, the prosecution sought to admit a document, whose author was not subject to cross-examination, that, standing alone, provided evidence incriminating the defendant. In *Geier*, a witness, subject to cross examination, provided expert testimony that was based on a scientific report written by a third party. Moreover, the affidavit in *Melendez-Diaz* was prepared almost a week after the forensic analysis was completed and simply stated the substance found on the defendant was cocaine. The DNA report in *Geier*, on the other hand, involved the immediate recordation of scientific facts and described the procedures that were followed in extracting the DNA evidence.

2. Reed has forfeited his Sixth Amendment claim

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[5] The court has granted review in *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted December 2, 2009, S176213 (*Geier* survives and is distinguishable from *Melendez-Diaz*); *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted December 2, 2009, S176620 (*Geier* survives and is distinguishable from *Melendez-Diaz*); *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted December 2, 2009, S176886 (expert's testimony based on another expert's report inadmissible under *Melendez-Diaz*); *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted December 2, 2009, S177046 (*Geier* disapproved by *Melendez-Diaz*); *People v. Benitez* (2010) 182 Cal.App.4th 194, review granted May 12, 2010, S181137 (*Geier* does not survive *Melendez-Diaz*); and *People v. Bowman* (2010) 182 Cal.App.4th 1616, review granted June 9, 2010, S182172 (*Melendez-Diaz* does not abrogate *Geier*).

In this case, we need not decide whether *Geier* remains good law in light of *Melendez-Diaz* because we conclude that Reed has forfeited his Sixth Amendment claim. Reed concedes that his attorney did not object to the admission of DNA or medical testimony on Sixth Amendment grounds. Reed also acknowledges that, as discussed above, a criminal defendant's right to raise an issue on appeal is forfeited by the failure to have made a timely objection in the trial court. *In re Seaton* (2004) 34 Cal.4th 193, 198 [forfeiture applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights].) However, Reed argues that forfeiture does not apply here because, at the time of his trial, *Melendez-Diaz* had not been decided and *Geier* "would have precluded the [Sixth Amendment] claims." Reed's argument is predicated on an exception to the forfeiture rule that applies "when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change." (*People v. Turner* (1990) 50 Cal.3d 668, 703 (*Turner*); see also *People v. Black* (2007) 41 Cal.4th 799, 810.) Even if we assume that *Melendez-Diaz* constitutes a change in the law, we conclude that it was not "unreasonable to expect [Reed's counsel] to have anticipated the change." (*Turner, supra,* at p. 703.)

During a pre-trial hearing, the prosecution described the manner in which it intended to introduce the DNA and medical evidence. The trial court thereafter summarized the holding in *Geier* and stated that "I would allow the evidence to come in probably for the reason cited in that case." However, the court also informed the parties that a similar issue was pending before the Supreme Court, stating "this is on cert to the U.S. Supreme Court. [¶] . . . [¶] I wanted to make both parties aware [of] . . . this case and there is this issue. And, in fact, the U.S. Supreme Court is going to resolve it." These statements provided Reed's attorney reasonable notice that *Geier's* holding was subject to reversal or modification.

Moreover, even if the trial court had not brought the issue to the parties' attention, *Geier* itself explained that there was a split of opinion among state and federal circuit courts concerning whether scientific reports were testimonial under *Crawford*. (*Geier,*

supra, 41 Cal.4th at p. 598 ["Courts that have addressed this issue disagree as to the answer"].) After engaging in an extensive review of those cases, the Court stated that "[w]hile we have found no single analysis of the applicability of *Crawford* and *Davis* to the kind of scientific evidence at issue in this case to be entirely persuasive, we are nonetheless more persuaded by those cases concluding that such evidence is not testimonial." (*Id.* at p. 605.) The split in the state and lower federal courts concerning whether forensic reports are testimonial under *Crawford*, considered in conjunction with the Court's acknowledgment that it did not find any of the relevant case law to be "entirely persuasive," leads us to conclude that *Melendez-Diaz* was not so unforeseeable as to excuse defendant from failing to raise a confrontation clause objection at trial.[6]

C. Reed's Ineffective Assistance Claim is Not Appropriate for Direct Appeal

Reed next argues that his attorney rendered ineffective assistance of counsel by failing to assert chain of custody or Sixth Amendment objections to the prosecution's DNA and medical evidence. "'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine

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[6] We also note that, given the significant factual differences between *Geier* and this case, it is not clear that *Geier* would have precluded a Sixth Amendment objection at the time of Reed's trial. In *Geier*, "the prosecution's DNA expert[] testified that[,] in her opinion[,] DNA extracted from vaginal swabs taken from [the victim] matched a sample of defendant's DNA." (*Geier, supra*, 41 Cal.4th at p. 593.) Although the expert's opinion was "based on testing that she did not personally conduct," (*id*. at p. 594), the expert had cosigned the DNA report. In contrast, the DNA analysts in this case, other than Russell Baldwin, did not testify as expert witnesses, they did not provide an opinion as to the ultimate issue of whether the DNA found on the victims matched the defendant's DNA and they did not sign the DNA reports. Instead, the witnesses simply reviewed the reports, which were not admitted into evidence, and told the jury what the reports said. Because *Geier* is arguably distinguishable, defense counsel's failure to raise a Sixth Amendment issue at trial cannot be excused on the ground that the "objection would have been . . . wholly unsupported by substantive law then in existence." (See generally *People v. Welch* (1993) 5 Cal.4th 228, 237 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"].)

confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.' [Citations.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

Our courts have "'repeatedly emphasized that a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding.' [Citations.]" (*People v. Jones* (2003) 30 Cal.4th 1084, 1105 (*Jones*).) Thus, in cases where "'the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

In this case, defense counsel may have had tactical reasons for failing to raise a chain of custody or Sixth Amendment objection. The California Supreme Court has observed that "[i]t is common . . . for counsel to stipulate to the chain of custody. Flaws in the chain are often mere technical omissions that competent counsel may consider unworthy of extended debate. (*Ibid.*) In fact, an objection on chain of custody grounds may be less productive for defendant than a decision to permit the prosecutor to establish a shoddy chain of custody that can be pointed out to the jury in the hope of giving rise to a reasonable doubt." (*People v. Lucas* (1995) 12 Cal.4th 415, 445, 446.) Similarly, the U.S. Supreme Court has noted that defense attorneys often stipulate to the accuracy of scientific evidence, explaining that "[i]t is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion." (*Melendez-Diaz, supra,* 129 S.Ct at p. 2542.) Thus, defense counsel may have decided that, rather than objecting to the fact that the prosecution was not calling the individuals who had conducted the medical examinations

and DNA analysis, Reed would be better served if counsel highlighted to the jury that the prosecution had not called those individuals.[7]

"That we can hypothesize a reasonable tactical basis for defense counsel's conduct does not, of course, prove that counsel did have a reasonable tactical basis for his action or inaction." (*Jones, supra,* 30 Cal.4th at 1122.) The record here does not actually show whether counsel had a tactical reason for failing to object to the DNA or medical evidence. He was never asked why he did not object and he never articulated a reason for his failure to do so. Therefore, for purposes of appeal, we reject petitioner's ineffective assistance claim and conclude that it is more appropriately decided in a habeas proceeding.

D. The Trial Court Did Not Err in Denying Reed's *Marsden* Motion

Reed next argues that the trial court abused its discretion when it denied his motion to replace Samuel Saltalamacchia with another appointed counsel.

1. Background regarding Reed's representation and Marsden Motion

Reed was initially represented by Los Angeles County Public Defender Robert Johnson. In early 2007, Johnson was transferred to another office and Reed's case was re-assigned to Leslie Stearns. On April 18, 2007, Reed brought a *Marsden* motion arguing that Stearns had not adequately investigated the case. After hearing argument, the court denied the motion.

Stearns was subsequently injured in an attack by an inmate, and Reed's case was transferred to Harvey Shearman. On March 6, 2008, the Public Defender's Office declared a conflict and Alternate Public Defender Seymour Applebaum was appointed to represent Reed. Less than three weeks later, the Alternate Public Defender's office declared a conflict and the court re-assigned his case to Samuel Saltalamacchia.

On January 6, 2009, Reed brought a second *Marsden* motion seeking a new appointed counsel to replace Saltalamacchia. During the *Marsden* hearing, the trial court

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[7] Indeed, Reed's counsel asked several witnesses about the location of the person who actually wrote the report. In addition, counsel asked witnesses to confirm that their testimony was predicated entirely on work that was done by other people.

asked Reed to explain why he was dissatisfied with his counsel. In response, Reed described four reasons why he did not believe he was receiving "adequate assistance." First, he stated that Saltalamacchia was not prepared to go to trial and had not reviewed exculpatory materials that Reed had given to his prior counsel. Second, Saltalamacchia had failed to bring a "search and seizure" motion that Reed had discussed with his prior counsel. Third, Saltalamacchia had not retained private investigators to "speak [with Reed about] . . . possible alibi witnesses." Finally, Reed complained that Saltalamacchia had failed to pursue a motion to sever the claims, adding "I understand he's busy but that's not good enough for me."

In response to Reed's concerns, Saltalamacchia told the court that he had spent a considerable amount of time reviewing all of the case materials, including materials that Reed had provided. Saltalamacchia further stated that he believed the investigation was "exhausted" and was unaware of any potential alibi defense. He also explained that Reed's prior counsel had prepared a memo about the purported search and seizure motion and concluded that there were no grounds for it. Saltalamacchia had independently reviewed the issue and agreed with prior counsel's assessment. Lastly, Saltalamacchia stated that, due to extensive DNA evidence tying Reed to the crimes, there was no basis for a motion to sever the counts.

At the conclusion of the hearing, the trial court informed Reed that Saltalamacchia was an experienced attorney who had handled numerous difficult and serious cases. The court further stated that he believed defense counsel had adequately addressed all of Reed's concerns and denied the motion.

2. The trial court did not abuse its discretion in denying Reed's Marsden *motion*

When a defendant requests the substitution of one appointed counsel for another, *People v. Marsden* (1970) 2 Cal.3d 118, mandates a court hearing to determine whether the first appointed counsel is rendering constitutionally inadequate representation. (*Id.* at pp.123-124.) "[T]he trial court must permit the defendant to explain the basis of his [or her] contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first

appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. [Citations]." (*People v. Crandell* (1988) 46 Cal.3d 833, 854 [abrogated on other grounds, *People v Crayton* (2002) 28 Cal.4th 346, 364-365].) A defendant must show good cause in seeking the substitution of an appointed attorney because appointment of more than one counsel wastes public resources by creating "duplicative representation and repetitive investigation at taxpayer expense," and may also allow defendants to "'delay trials and otherwise embarrass effective prosecution' of crime. [Citation.]" (*People v. Ortiz* (1990) 51 Cal.3d 975, 986.)

The record in this case does not "clearly show" that Saltalamacchia was rendering ineffective assistance of counsel or that Saltalamacchia and Reed had an irreconcilable conflict that was likely to result in ineffective representation. After Reed explained his reasons for seeking new appointed counsel, Saltalamacchia provided assurances to the court that he had reviewed the record, was prepared for trial and did not believe a motion to sever or suppress evidence had any merit. Saltalamacchia's responses to Reed's complaints were reasonable and the trial court was justified in relying on those assertions.

Ultimately, it appears that Reed's complaints reflected a difference of opinion concerning tactical decisions, including whether to pursue an alibi defense and various procedural motions. "Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.'" (*People v. Welch* (1999) 20 Cal.4th 701, 728-729.) If defense counsel did in fact ignore key evidence or arguments that might have led to an acquittal in this case, Reed may pursue those claims in a habeas proceeding.

E. The Trial Court Did Not Engage in Judicial Misconduct

Reed asserts that the trial court committed judicial misconduct when, in the presence of the jury, it asked a witness whether she saw her assailant in the courtroom. Reed contends that, by asking the witness "the ultimate question of identification, the trial judge was partial toward the prosecution and discredited the defense," thereby

violating his right to due process and right to a jury trial. Reed has forfeited this claim and, even if he had preserved the issue, it has no merit.

1. Factual Background

During Celia B.'s direct examination, the prosecution did not ask her to identify her attacker. On cross examination, Celia stated that, prior to trial, the police had shown her a six pack of photographs and that she had identified one of the individuals as her assailant. However, she did not mention whether the person she identified was Reed. Immediately thereafter, the court asked Celia: "The person that was involved in your situation, do you see that person in the courtroom today?" Celia said the assailant was present and identified Reed. On re-cross examination, defense counsel asked Celia whether the individual she had originally identified to police was Reed and she said no. Counsel then questioned Celia at length as to why her identification had changed.

Outside the presence of the jury, the court explained why it had asked the question, stating that a juror had previously inquired why Patty K., who testified before Celia, was not asked to identify her attacker. The prosecution informed the court that it had decided not to have the victims identify Reed because there were problems in the identification process and the events had occurred three years ago. The prosecutor also stated that it had other evidence that corroborated Reed's identity. In response, the court stated that, "given [Celia's] contact with the individual," it believed the question was appropriate and that "someone should ask." The Court made clear, however, that it would not ask the question again.

2. Reed's judicial misconduct claim has been forfeited and has no merit

Reed concedes that, during the trial court proceedings, his counsel never objected to the court's questioning of Celia. "[I]t is settled that a judge's examination of a witness may not be assigned as error on appeal where no objection was made when the questioning occurred." (*People v. Corrigan* (1957) 48 Cal.2d 551, 556; see also

People v. Sanders (1995) 11 Cal.4th 475, 531.) Therefore Reed has forfeited his claim of judicial misconduct.[8]

Even if Reed had preserved his claim, we would reject it on the merits. Although "'the Due Process Clause . . . requires a "fair trial in a fair tribunal," [citation], before a judge with no actual bias against the defendant or interest in the outcome of his particular case,'" (*People v. Harris* (2005) 37 Cal.4th 310, 346), our courts have emphasized that "[a] trial court has both the discretion and the duty to ask questions of witnesses provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony," (*People v. Cook* (2006) 39 Cal.4th 566, 597). In reviewing whether a court's examination of a witness constitutes judicial misconduct, our " role . . . 'is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial. [Citation.]' [Citation.]. . . . [S]uch a violation occurs only where the judge '"officiously and unnecessarily usurp[ed] the duties of the prosecutor . . . and in so doing create[d] the impression that he [was] allying himself with the prosecution."' [Citation.]" (*Harris, supra,* 37 Cal.4th at p. 346.)

The single question asked by the trial court did not create the impression that the court was partial to the prosecution. Indeed, there is no evidence that the court knew how the witness would answer the question and, as a result, the question might have benefited Reed. Moreover, the ultimate effect of the court's question was to clarify confusing testimony that Celia provided during her cross examination. Celia told defense counsel she had previously identified her attacker from a six pack of photographs, but she failed

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[8] In a single sentence of his brief, Reed asserts that "the failure to object was ineffective assistance of counsel, cognizant on direct appeal." Because Reed's conclusory statement is unaccompanied by any argument explaining why his counsel's failure to object to the court's questioning constituted ineffective assistance, we need not address the issue. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [it is not the role of reviewing court to independently seek out support for appellant's conclusory assertions, and such contentions may be rejected without consideration].)

to explain whether Reed was the person she identified. Immediately thereafter, the trial court then asked Celia whether her attacker was present in the courtroom. When Celia identified Reed, defense counsel re-examined Celia, who then clarified that the individual she originally identified to police was not Reed. Thus, had the court not asked its question, the jury may have been left unaware that, prior to trial, Celia identified a different individual as her attacker.

F. The Trial Court Erred in Calculating the Sentence Relating to Reed's Robbery Offenses

Finally, Reed contends that the trial court erred in calculating the determinate sentence for his four counts of second degree burglary, which included counts 4, 6, 9, and 17. The court elected count 4 as the principal count, and imposed the middle term of three years, in addition to a 10-year firearm enhancement pursuant to Section 12022.53(b). For counts, 6, 9, and 17, which were subordinate counts, the court imposed the middle term of 3 years for each count, to run consecutive to the 13-year sentence imposed under count 4. The court also added a 10- year firearm enhancement for count 17, which was also to run consecutive to the sentence on count 4. The total sentence imposed for counts 4, 6, 9 and 17 was 32 years.[9]

Reed argues that the court failed to apply section 1170.1, subdivision (a), which requires that, when imposing consecutive sentence for two or more felonies, "[t]he subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." Reed contends that, under this section, the consecutive sentences on counts 6, 9 and 17 should have been

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[9] In addition, the trial court sentenced Reed to an indeterminate sentence of 100 years to life for counts 2, 5, 10, and 14, each of which were subject to the One Strike Law. (See Penal Code, § 667.61). Reed also received a determinate sentence of 24 additional years for counts 7, 15 and 16, which involved sexual crimes that were not subject to the One Strike Law. (See Penal Code, §§ 667.6, subds. (c) and (d).) Reed does not contend that the trial court erred in calculating those sentences.

reduced to one year and the firearm enhancement on count 17 should have been reduced to three years and four months. (See generally *People v. Moody* (2002) 96 Cal.App.4th 987, 994.)

The Attorney General concedes that the trial court erred in calculating the determinate sentence imposed in relation to the robbery counts and requests that the matter be remanded for resentencing on those counts only.

We agree that the trial court failed to properly apply section 1170.1, subdivision (a) and, as a result, remand for resentencing.[10]

DISPOSITION

Reed's conviction is affirmed. The matter is remanded for re-sentencing, consistent with this opinion.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

[10] Reed also requested that we conduct an independent review of the in camera portion of the trial court's *Pitchess* proceedings and determine whether any discoverable information was withheld. (See generally *People v. Mooc* (2001) 26 Cal.4th 1216.) The Attorney General did not oppose the request. We have reviewed a sealed reporter's transcript of the trial court's in camera portion of the *Pitchess* proceeding and conclude that no further proceedings are required.